



August 19, 2002

Ms. Carol Longoria
Public Information Coordinator
University of Texas System
201 West 7th Street
Austin, Texas 78701-2981

OR2002-4570

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 167254.

The University of Texas System (the “system”) received a request for “information from the procurement process of the Chiller Plant Expansion of the North Campus at UT Southwestern Medical Center [including] . . . the documents used in the evaluation process, a copy of the competition’s proposal, and emails that were shared between John Peterson and Ed Knight.” You claim that some of the requested information may be excepted from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code, but state that the system takes no position with respect to the request. You have notified York International Corporation (“York”), a third party whose proprietary interests have been implicated, of the request pursuant to section 552.305 of the Government Code. *See* Gov’t Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov’t Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). We have considered York’s arguments and have reviewed the submitted information.

We note initially that York wishes to withhold sections 1, 2, 4, 5, and 8 of the bid proposal dated February 22, 2002 containing pricing, drawings, marketing strategies, customer contacts, and equipment performance data. The proposal submitted by the system does not contain any enumerated sections. Nevertheless, we are able to identify the information based on York’s description of the information.

We now consider York’s arguments that the system must withhold these sections of the bid proposal under sections 552.101, 552.104, and 552.110. Section 552.104 excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.”

Section 552.104 was not intended to protect the interests of business entities that submit information to governmental bodies. This exception protects information from disclosure when the governmental body demonstrates potential specific harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1991), 592 at 8-9 (1991), 463 (1987), 453 at 3 (1986). The system has not argued that the release of York's bid proposal dated February 22, 2002 would harm its interests in a particular competitive situation. Accordingly, this information is not excepted from disclosure pursuant to section 552.104 of the Government Code.

Next, York argues that portions of its bid proposal are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 252.049 of the Local Government Code.¹ Section 252.049 provides:

(a) Trade secrets and confidential information in competitive sealed bids are not open for public inspection.

(b) If provided in a request for proposals, proposals shall be opened in a manner that avoids disclosure of the contents to competing offerors and keeps the proposals secret during negotiations. All proposals are open for public inspection after the contract is awarded, but trade secrets and confidential information in the proposals are not open for public inspection.

Local Gov't Code § 252.049(a), (b). However, section 252.049 protects confidential information in bids or proposals involving a municipality. We are not aware of the involvement of any municipality in this situation. Therefore, section 252.049 of the Local Government Code is inapplicable.

Section 552.110(b) excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See* Open Records Decision Nos. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure).

¹ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses information protected by other statutes.

York argues that disclosure of portions of its bid proposal would allow its competitors to adjust their bids against York in future procurements for similar equipment. York argues that this adjustment would result in "future lost sales where the recipient competitor underbids York's bids based on enhanced knowledge of the cost and performance of York's equipment." After reviewing York's bid proposal documents dated February 22, 2002 and the arguments presented, we conclude that York has demonstrated based on specific factual evidence that the release of some of the submitted information would cause it substantial competitive harm. We have marked the portions of the submitted information that the system must withhold pursuant to section 552.110(b) of the Government Code. We note that the system must release some of York's pricing information if York was the winning bidder and the prices are incorporated into the contract. If York was not awarded the contract and the pricing information we marked is not incorporated into the contract, the system must withhold this information under section 552.110. *See* Open Records Decision Nos. 319 (1982) (finding information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not ordinarily excepted under section 552.110), 306 (1982) (finding that pricing proposals may only be withheld during bid submission process), 184 (1978), 175 (1977). With regard to York's claim that its configuration pricing should remain confidential, we note that federal cases applying the analogous Freedom of Information Act exemption to prices in awarded government contracts have denied protection for such prices, reasoning that disclosure of prices charged the government is a cost of doing business with the government. *See generally* Freedom of Information Act Guide & Privacy Act Overview (1995) 151-152. Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* Open Records Decision No. 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). The system must release all remaining responsive information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the

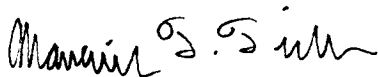
governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Maverick F. Fisher
Assistant Attorney General
Open Records Division

MFF/seg

Ref: ID# 167254

Enc. Submitted documents

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